FILED

No. 01 707 AUG 21 2001

In The

Supreme Court of the United States

JAMES COMINSKY

Petitioner

v.

DIANE MALNER

AND

ANDREW AND SYLVIA ALJANCIC

On Petition For Writ Of Certiorari
To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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57pp

Questions Presented For Review:

Question No. I: Whether a litigant's procedural due process rights are violated when a trial judge refuses to allow a party to appear *pro se* and thereafter strikes motions so filed from the court's record.

Question No. II: Whether a litigant's procedural due process rights are violated when a trial judge hears and determines a matter presented by an opposing counsel with whom he is related.

Question No. III: Whether the creation of even the potential appearance of impropriety requires that a trial judge recuse himself from hearing a matter presented by an opposing counsel with whom he is related.

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Trial Court — Lake County Court of Common Pleas, Painesville, Ohio: Cominsky v. Malner, et al., Case Number: 97 CV 1279, opinion dated 10/08/98.

Ohio Appellate Court — Ohio Eleventh Appellate District Court of Appeals, Warren, Ohio: Case Number(s): 98-L-242, 99-L-101, opinions for both appeals dated 01/02/01.

Ohio Supreme Court — Columbus, Ohio: Case Numbers: 01-385 and 01-386 (consolidated), jurisdiction declined by orders dated 05/23/01.

Basis For Jurisdiction

This matter comes before this Honorable Court upon the Ohio Supreme Court's refusal to accept jurisdiction and review an opinion rendered by a Lake County, Ohio Court of Common Pleas trial court after an unsuccessful appeal to the State of Ohio Eleventh Appellate District. Said Order refusing jurisdiction was entered May 23rd, 2001. The statutory provision which confers jurisdiction upon this Honorable Court to review this matter on a writ of certiorari is 28 USC § 1257.

Constitutional Provisions and Statutes

Amendment V to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, §16 of the Ohio Constitution:

All courts shall be open, and every person,

for an injury done him in his land, goods, person, or reputation, shall have the remedy by due course of law, and shall have justice administered without denial or delay.

Statement Of The Case

This case arises from an action initiated in the Lake County Court of Common Pleas, Painesville, Ohio for unjust enrichment, partition of land, and to quiet title against the Respondents. Throughout the course of the pretrial and trial procedures, the trial judge made a number of evidentiary decisions which were, in Petitioner's opinion, erroneous. For instance, the trial judge, the day of trial, indicated that he was going to allow the Respondents the opportunity to present testimony from witnesses only previously disclosed to the Petitioner the preceding court day, yet the same court denied the Petitioner's expert from testifying even though his identity had been known to the Respondent for over three months. Likewise, Petitioner and certain witnesses for the Petitioner were rushed through their testimony by the trial court and felt that they never had the opportunity to convey the essence of their respective testimony. Further, the trial judge denied admission into evidence over half of the Petitioner's timely filed and authenticated exhibits while admitting all of opposing counsel's exhibits, and then went on to make findings of fact inconsistent with the very evidence he excluded!

As the trial began to wind down, Petitioner felt that his attorney had deceived him on a number of matters including whether certain evidentiary matters had been stipulated to prior to trial. As such, Petitioner discharged his legal counsel who then filed a Motion to Withdraw as Petitioner's counsel on September 2nd, 1998. With no ruling on this motion having been made, and with the procedural time limits for filing certain motions rapidly approaching, Petitioner filed a *pro*

se Motion for Mistrial on October 1st, 1998. With the trial court not having yet ruled on Petitioner's counsel's Motion to Withdraw, said counsel filed a second Motion to Withdraw on October 9th, 1998. Still, the trial court did not rule. Petitioner, still concerned about procedural time limits, then filed a *pro se* Motion For Findings of Fact and Conclusions of Law on October 15th, 1998, a *pro se* "Motion to Terminate Counsel Services" on October 21st, 1998 (in an attempt to urge the trial court on to rule), and finally a Motion for a New Trial on October 21st, 1998.[1]

Matters reached a critical mass on October 23rd, 1998 when the trial court finally ruled on the pending motions via a journal entry which read in pertinent part as follows:

> It is the order of this court that attorney David J. Gornick is hereby released as counsel for the Plaintiff James Cominsky. It is further ordered from this Court that James Cominsky shall obtain an attorney to represent him in this matter. James Cominsky may not represent himself. Plaintiff's Motion for Mistrial and Request for Findings of Fact and Conclusions of Law and Motion for New Trial were filed without authority and are to be stricken.

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[1] The grounds for the new trial included the alleged apparent misconduct of Plaintiff-Appellant's own legal counsel as well as additional evidence that was supposed to have been either stipulated to or admitted into evidence at trial. This evidence would have clearly showed many of the trial court's findings and rulings to have been erroneous. Plaintiff-Appellant suspects that the trial judge intentionally struck Plaintiff-Appellant's Motion for a New Trial so as to continue to exclude this evidence.

> It is further ordered that James Cominsky may not file any further documents *pro se* or otherwise in this cause, unless ordered by the Court. The Clerk of Courts is hereby ordered not to accept any pleadings or documents for filing in the within cause from Plaintiff James Cominsky.

Given the time constraints at hand for filing the referenced motions, and given the scope and complexity of the case at bar, it was wholly unrealistic to expect the Petitioner to be able to retain any attorney who was not only willing but also able to undertake an effective representation of the Petitioner. That, combined with the trial court's prohibition of the Petitioner from appearing *pro se* guaranteed that the Petitioner would be denied access to the trial court proceedings for the immediate time, all in contravention of the Petitioner's constitutional right to redress in the courts.

The trial court ultimately ruled against the Petitioner in this matter and the Petitioner appealed to the Eleventh District Court of Appeals for Lake County citing numerous assignments of error including the trial court's erroneous evidentiary rulings and the unconstitutional prohibition against the Petitioner appearing *pro se*. Ultimately, the court of appeals upheld the trial court's actions but, ironically, did so citing a case previous previously before it that held to a contrary ruling (see argument and law discussed below).

While that appeal was pending, and increasingly concerned that the trial court was trampling upon his rights and likewise increasingly suspicious that there may have been some

undisclosed bias at work, Petitioner retained the services of a private investigator who conducted an investigation (including a thorough review of public records) and discovered that Respondent's legal counsel, David M. King, is and was a blood relative of Joseph D. King who is the trial judge's son-in-law and the father of the trial judge's grandchild. Petitioner thereafter filed a *pro se* motion to amend his Appellate Brief to point out his discovery concerning the potential for the trial judge's bias. *Opposing counsel did not respond to this motion or ever deny the alleged relationship*, yet after waiting over thirty days, the Ohio Eleventh District Appellate Court struck from its records Petitioner's *pro se* filing which revealed his discovery of the trial judge's potential for bias and refused to consider same noting only that since Petitioner had appellate legal counsel, all Appellate Court filings should be made through counsel of record. Ultimately, when the Appellate Court handed down its affirmance of the trial judge's holdings, Petitioner filed a Memorandum In Support of Jurisdiction to the Ohio Supreme Court. It was in that Memorandum that Petitioner first raised as his three propositions of law to be considered the violations of his procedural due process rights under both the Ohio Constitution and the United States Constitution. **NOTE:** this was not done earlier by the Petitioner because the relationship between the trial judge and the Respondents' legal counsel was not known until *after* the Petitioner's appeal to the Ohio Eleventh Appellate District was filed and briefed. Petitioner's discovery of the trial judge's potential for bias placed in sharp relief the many evidentiary rulings which Petitioner believed were erroneous and suggested the basis for same.

Despite this, on May 23rd, 2001, the Ohio Supreme Court refused to grant jurisdiction to hear this matter stating only that "[u]pon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question." This Petition for a Writ of Certiorari was subsequently filed.

Law And Argument

Proposition of Law No. I: A litigant's procedural due process rights are violated when a trial judge refuses to allow a party to appear *pro se* and therefore strikes motions so filed from the Court's record.

Article I, §16 of the Ohio Constitution provides that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have the remedy by due course of law, and shall have justice administered without denial or delay." Federal Courts have also agreed that "[a]ccess to the courts is a right protected by the due process clause of the Fourteenth Amendment ..." Lee v. Baroski (D.C. Va., 1975), 404 F. Supp. 1394; that the "[o]pportunity to be heard is fundamental to due process and is the keystone to the judicial system..." Sierra Club v. SCM Corp. (D.C. NY, 1983), 572 F.Supp. 828; and that "[t]he fundamental requirement of due process is the opportunity to be heard." Adams v. Wainright (D.C. Fla, 1981), 512 F.Supp. 948. Likewise, this Honorable Court has previously held that "[o]pportunity to be heard is

an essential requisite of due process of law in judicial proceedings." Richards v. Jefferson County, Ala. (U.S. Ala., 1996), 116 S.Ct. 1761, 517 U.S. 793.

In this case below, the trial court effectively barred the Petitioner from access to the court for a redress of his perceived wrongs when, *on the same day and in the same order*, it granted Petitioner's legal counsel's Motion to Withdraw, denied the Petitioner his right to represent himself, ordered him to obtain a different attorney, mandated that his *pro se* filings be stricken from the record and further ordered the Clerk of Court not to accept for filing any pleadings or documents from the Petitioner, all despite the apparent time deadlines set forth in the Ohio Rules of Civil Procedure for the filing of same. [2] Given that procedural due process requires that a litigant be provided the opportunity to be heard, the trial court's only allowing the Petitioner to be so heard via a set of hurdles logistically impossible to overcome was akin to denying such right entirely. This Honorable Court should grant certiorari to hear this matter in order to review whether Petitioner's con-

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[2] Said order was entered by the trial judge on October 23, 1998, one day *after* the fourteen day deadline to file a Motion for a New Trial had expired. Petitioner had in fact timely filed said Motion for a new trial on October 21, 1998, but the trial judge's order had that *stricken* from the Court's record along with Petitioner's Motion for Findings of Fact and Conclusions of Law. Thus, there was no possible way that Petitioner could ever have a Motion for a New Trial filed in this case, even if he could immediately find a new attorney to represent him, as the relevant deadline to file same had already passed.

stitutional right to procedural due process has been violated.

Curiously, the Ohio Eleventh Appellate District overruled Petitioner's assignment of error on this point citing a case previously before it (In Re: Bowens (Nov. 9th, 1995), unreported, 1995 Ohio App. LEXIS 5021, filed separately in Petitioner's supplemental Appendix) for the proposition that "... a trial court may terminate self-representation where the individual deliberately engages in serious and obstructionist misconduct." *Id.* at 4. However, a review of that case reveals that the Appellate Court in that matter reversed the trial court holding that a *pro se* litigant who merely untimely and improperly issued subpoenas was hardly engaging in "serious and obstructionist misconduct" and could indeed therefore continue to represent himself.[3] In the within matter, there was nothing in the record to indicate that the Petitioner was in any way ever threatening or inappropriately disruptive to the trial court's proceedings or personnel. As such, the Ohio Eleventh District Court of Appeals dismissed the Petitioner's assignment of error regarding his being prevented from appearing *pro se* by relying on a case that stood for an opposite proposition given the facts under review. A number of other holdings from that Appellate Court also caused Petitioner to seriously question the degree of thoroughness with which that court reviewed the proceedings below.

For instance, a number of "facts" upon which the Court apparently relies in making its

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[3] Further, the Bowens case was itself reversed by the same court which originally rendered it on June 30, 1999.

determination were never even in evidence, nor did they ever exist. For instance, the Appellate Court noted that certain real property at issue in this case below (a home identified as 11000 S.R. 86 and recorded as 11770 S.R. 86) was sold at Sheriffs sale on January 19, 1999. (Appellate Opinion, p. 7) This sale never occurred! Further, the actual deed to the property evidencing true ownership of the land at issue was one of the documents which Petitioner sought to have entered into evidence as an exhibit but which was excluded by the trial judge (discussed infra), and which was again removed from the record when the trial judge struck Petitioner's pro se Motion for a New Trial (to which a copy of the deed was attached). Thus, the trial court incorrectly ruled on matters not in evidence, and the Appellate Court held that said rulings below were correct while ignoring the fact that the evidence upon which the trial court ruled was never admitted! This type of error is rife throughout the Appellate Court's opinion and also may be considered a violation of Petitioner's due process rights relative to whether the Petitioner even had a competent tribunal of review, but this is better argued in Petitioner's Brief should this Honorable Court grant certiorari.

Also of particular concern is the fact that one of the Petitioner's *pro se* motions stricken from the record was that for a new trial. Said motion, while not technically perfect, set forth a number of evidentiary matters and materials which could have certainly warranted a new trial given the misconduct alleged. This included evidence which directly refuted certain findings of fact by the trial court including evidence of septic system approvals and building site evaluations showing the partnership between Petitioner and

the Respondents Aljancic, a summary of Petitioner's expert testimony based upon the only full audit of all of the partnership's book conducted by anyone wrongfully excluded by the trial judge as "redundant", and further evidence of cancelled checks and bank statements which showed that the trial court's calculation of damages was plainly wrong. This was all evidence which Petitioner was assured by his trial counsel had been stipulated to or admitted which later turned out not to be (in part the basis for Petitioner discharging his trial counsel). By striking said motion from the record and in essence prohibiting the Petitioner from being able to refile same or obtain an attorney to do so within the appropriate time limits set forth in the Ohio Rules of Civil Procedure, the trial court effectively barred the Petitioner from obtaining effective appellate review of the issues contained therein. Again, this a constructive denial of the Petitioner's constitutionally mandated procedural due process rights. A grant of certiorari to hear this matter is clearly warranted by this Honorable Court if justice is to prevail.

Proposition of Law No. II: A litigant's procedural due process rights are violated when a trial judge hears and determines a matter presented by an opposing counsel with whom he is related.

This Honorable Court has previously held that "[d]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." Schweiker v. McClure (1982), 102 S.Ct. 1665, 456 U.S. 188. Likewise, it has

been held that "[t]he impartial conduct of a judicial or quasi-judicial proceeding is one of the most fundamental rights of due process." Brown v. U.S. (D.C. Tex., 1974), 377 F. Supp. 530. Further, Federal Courts have held that an "[i]mpartial decision maker is a basic constituent of minimum due process." Megill v. Board of Regents of State of Fla. (C.A. Fla, 1976), 541 F.2d 1073). Indeed, even the Ohio Supreme Court has held previously that the presence on the bench of a judge who is not impartial "is structural constitutional error." State v. Esparza (1996), 74 Ohio St. 3d 660 at 662. That Court went to hold in that opinion that "[i]deed, 'the mere appearance of bias can violate due process.'" *Id.*

Based upon his discovery of the trial judge's apparent relationship with opposing counsel, Petitioner is sure that even the potential for a personal relationship between the trial judge and the Respondent's legal counsel is cause for concern as it certainly created at least the appearance of impropriety and, as such, resulted in his never being completely sure whether any decisions which the trial judge rendered — whether any evidentiary rulings which the trial judge made — were the proper result given the facts and the appropriate interpretation of the law or in reality motivated by some other concern which would be completely inappropriate in the eyes of the law. When one considers the scenario set forth above [where the trial judge allowed the Petitioner's attorney to withdraw from representing the Petitioner, struck the Petitioner's filings from the Court's record and further ordered the Clerk of Court to refuse further *pro se* filings from the Petitioner, all of which effectively prevented the Petitioner from ever having a Motion for a New Trial properly considered

by that court (or even the reviewing Ohio Eleventh District Court of Appeals as it was stricken from the record), despite the fact that it contained uncontroverted evidence displaying the trial court's errors in its written opinion] one is hard-pressed not to assume that some sort of bias on the part of the trial judge was at work. Uncertainty as to the motive for this type of ruling created the appearance of impropriety and therefore undermined the fundamental functioning of the legal system and the public's trust in same in this case below.

It has been held that "[d]ue process of law requires notice, a fair opportunity to be heard, and the right to produce testimony, including the right to cross-examine witnesses..." Cicerella v. Jerusalem Bd. of Zoning Appeals (1978), 59 OApp2d 31, 392 NE2d 574 (emphasis added). In a courtroom where the trial judge is related (albeit somewhat removed) to opposing counsel, one certainly wonders whether it was even possible for that tribunal to be fair. Absent that fairness, there could be no due process, and without that, a fundamental right guaranteed by the Ohio Constitution has been abridged to the prejudice of the Petitioner. Likewise, it has been held that when any question arises as to fairness and impartiality of the trial judge, *all doubts should be resolved in favor of claims of prejudice.* White v. Hicks (1961), 118 Ohio App. 56, 193 NE2d 193 (emphasis added).

Federal Courts seated within Ohio have also held that "... the right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." Palmer v. Columbia Gas of Ohio, Inc. (CA 6th, 1973), 479 F.2d 153, 72

OO2d. 337.[4] Indeed, case law in Ohio also states that an individual's right to due process requires a meaningful opportunity to be heard before a *neutral* tribunal. Westgate Shopping Village v. Toledo (CA 6th Dist. 1994), 93 Ohio App.3d 507, 639 NE2d 126 (emphasis added).

Again, with it being discovered that the trial judge in the within case below was related to opposing counsel, it is manifestly apparent that the Petitioner's constitutional right to procedural due process was violated as one could assume (when resolving all doubts in favor of a claim of prejudice as mandated by White, *supra*) that judicial neutrality was impossible. With such a fundamental right at issue, this Honorable Court should see that it is obliged to grant certiorari in this case as a matter of tremendous public interest going to the very root of our judicial process: if a litigant is not entitled to a trial before a disinterested judge, even if the trial judge's apparent bias is only discovered after the trial on the cases' merits, then

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[4] The Ohio Supreme Court has held that the "due course of law" clause of the Ohio Constitution is equivalent to the "due process of law" clause of the Fourteenth Amendment to the Federal Constitution. Direct Plumbing Supply Co. v. City of Dayton, 38 NE2d 70, 138 Ohio St. 540. Thus, Federal case law on the due process issues presented herein was relevant and applicable to that Court's considerations. Despite that, the Ohio Supreme Court declined to accept jurisdiction of this case below holding that the matter was not one "involving any substantial constitutional question." That Court, however, completely ignored and failed to even comment on the Petitioner's other fully briefed basis for accepting jurisdiction — that the matter "was one of great public concern."

just what is he entitled to? The mere passage of time before the confirmation of a trial judge's bias should not lessen the certainty of the constitutional right to procedural due process.[5]

> Proposition of Law No. III: The creation of even the potential appearance of impropriety requires that a trial judge recuse himself from hearing a matter presented by an opposing counsel with whom he is related.

Even if Petitioner had never become aware of the trial judge's apparent relationship with opposing counsel and the potential for claims of judicial bias which could stem therefrom, it was incumbent upon the trial judge, when he became aware that this matter was going to be litigated by an attorney who was related to his son-in-law, to recuse himself to avoid even the appearance of impropriety. At the very least, this relationship should have been disclosed to all concerned parties and their attorneys of record so that appropriate courses of action, if deemed necessary, could have been taken in a timely manner.

In American Textile, *supra*, it was held that "...judges have an ethical duty to disclose on the record information which the judge believes the

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[5] It should also be noted that it has been held that a litigant's duty to investigate the facts of his case does not include a mandate for investigations into a judge's impartiality. American Textile Mfrs. Institute, Inc. v. The Limited, Inc. (CA6th, 1999), 190 F.3d 729. Thus, the Petitioner's discovering the apparent basis for the trial judge's perceived bias against him only after the trial on the merits should not be held against him.

parties or their lawyers might consider relevant to the question of disqualification." In fact, the Canon Code of Judicial Conduct provides that a judge should disqualify himself from hearing a case in which the judge's impartiality might reasonably be questioned. Code of Jud. Conduct, Canon 3, subd. (E)(1). Ohio courts have upheld this responsibility holding that "[a]ny judge has authority and, in fact, duty, to disqualify himself when his impartiality might reasonably be questioned." City of Cleveland v. Willis (Ohio Mun. 1980), 410 NE2d. 823, 17 OO3d. 385.

Federal Courts too have held that a "[c]ardinal principal of judicial conduct is that a judge must avoid not only actual impropriety but also the appearance of any impropriety." Gulf & Western Industries, Inc. v. U.S. (Ct. Cl., 1982), 671 F.2d 1322. It has further been held that "[e]very justice, judge and magistrate is required to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Hall v. Small Business Administration (C.A. Miss., 1983), 695 F.2d 175. Also, "[a]voiding [the] appearance of impropriety is as important to developing public confidence in [the] judiciary as avoiding impropriety itself." U.S. v. Hollister (C.A. Minn., 1984), 746 F.2d 420. Finally, it has been held that "[w]here [the] question is close, [a] judge whose impartiality might reasonably be questioned must recuse himself from trial." U.S. v. Ferguson (D.C.N.Y., 1982), 550 F. Supp 1256.

In the within case, it should not have taken the hiring of a private investigator by the Petitioner to learn of the trial judge's relationship with opposing counsel: this information should have been volunteered by the trial judge so that the parties, if they were so inclined, could have prop-

erly and immediately brought their concerns before the Ohio Supreme Court for consideration through an Affidavit of Prejudice.[6]

The failure of the trial judge to make known his relationship to opposing counsel known and the appearance of impropriety which this subsequently created arguably makes all of the trial judge's judicial acts suspect. Whether such non-disclosure under these circumstances was appropriate, and if not, whether trial judges can engage in such non-disclosure with impunity is a matter of great public interest deserving of a grant of certiorari by this Honorable Court: the public should not have to wonder whether a judge hearing their case has something of potential import relating to a perception of bias on his part which he has not disclosed: the public should feel confident that any trial judge in such a curious situation should immediately make same known to all so that they can decide whether the degree and extent of the thing so disclosed warrants further action on their part. This required disclosure serves to reinforce the public's perception that, whatever the outcome of their court proceeding, it was arrived at fairly and impartially. This Court's grant of certiorari to hear this case will serve to buttress the public's increasing lack of faith in the judicial system.

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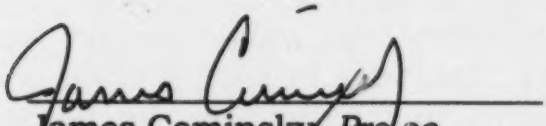
[6] While Petitioner did file an Affidavit of Prejudice in the case below, this was done at the conclusion of the trial and was based solely upon evidentiary decisions of the trial judge's which were viewed as having been erroneous. The better basis for such an affidavit — the trial judge's potential for bias — was still unknown to the Petitioner.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Petitioner requests that this Honorable Supreme Court grant certiorari and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,



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Appendix

Ohio Supreme Court Order Denying Jurisdiction

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Ohio Eleventh Appellate District Opinion

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Ohio Eleventh Appellate District Judgement Entry

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Affidavit of David I. Morris, private investigator

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FILED ON:
MAY 23 2001

The Supreme Court of Ohio

Mr. James Cominsky	:	Case No. 01-386
Appellant,	:	
v.	:	ENTRY
Diane Malner et al.,	:	
Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court decline jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket fee, $40.00, paid by Major and Associates.

(Lake County Court of Appeals, No. 98L242)

/s/
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY, OHIO

MR. JAMES COMINSKY, CASE NO. 98-L-242
Plaintiff-Appellant,

-vs-

FILED ON:
JAN 02 2001

DIANE MALNER, et al.,
Defendants-Appellees.

JUDGES
HON. JUDITH A. CHRISTLEY, P.J.,
HON. ROBERT A. NADER, J.,
HON. JOSEPH DONOFRIO, J., Ret.,
Seventh Appellate District, sitting by assignment.

CHARACTER OF PROCEEDINGS: Civil Appeal
from the Court of Common Pleas
Case No. 97 CV 001279

JUDGMENT: Affirmed.

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OPINION

DONOFRIO, J., Ret.

Appellant, Mr. James Cominsky, appeals the judgment entry of the Lake County Court of Common Pleas, in which certain sums of money were determined to be owed to appellees, Diane Malner ("Malner"), and Mr. and Mrs. Aljancic ("the Aljancics"), Malner's parents. For the reasons advanced below, we affirm.

It must be noted at the outset that the trial court had before it a very difficult case to adjudicate because the parties intertwined their financial dealing without any definitive agreement or writing declaring goals or objectives.

On November 20, 1997, appellant filed a second amended complaint setting forth nine separate counts. After a trial was held in this matter, the trial court issued a judgment entry in which a lengthy recitation of the findings of fact was conveyed. In that judgment entry, the trial court found that in 1985, Malner was a widow with three minor children, while appellant was divorced and had two minor children. During that time, appellant was unemployed and possessed no funds to pay past or current child support to his former wife.

After dating for several months, appellant and Malner began living together in Malner's home. Improvements to her home were made to accommodate appellant's children. Importantly, throughout their relationship, appellant and Malner did not have a specific oral or written agreement concerning how to handle their joint assets. There also was no agreement concerning their goals or objectives. Thus, their affairs were handled according to the demands of the moment.

In 1987, Malner purchased a dump truck for $55,000 and created a trucking company in order to supply appellant with employment. In order to create the trucking company, Malner borrowed $30,000 from a lending institution and $25,000 from the Aljancics. According to tax returns, appellant was first hired as an employee and then as a subcontractor for the trucking company, which lasted until 1993, when the truck loan was paid and title was transferred to appellant. There was no consideration for the transfer to appellant.

In 1989, appellant and Malner purchased 22.39 acres for the sum of $95,000. The Aljancics provided one-half the purchase price, while appellant and Malner supplied the remainder. Appellant's and Malner's $47,5800 contribution consisted of a loan from the Aljancics in the amount of $22,500 and $25,000 in cash from their own assets. The Aljancics were not then identified as co-owners of the property.

During the summer of 1989, the property began being developed. In order to facilitate the building of houses on the property, the Aljancics purchased a bulldozer for $20,000. Appellant was supposed to pay for the maintenance of the bulldozer. The Aljancics also incurred various other costs associated with the land development.

In 1991, appellant and Malner formed a corporation called American Cherished Homes, Inc. Appellant was fifty-one percent owner and Malner was a forty-nine percent owner. The corporation was formed for the purpose of constructing the three homes to be built on the property, and existed until 1996, when the corporation was dissolved.

In October 1991, 5.011 acres of the property were deeded to the Aljancics so that they could build a home. The house was completed in 1992, and is identified as 10500 S.R. 86. Appellant built the home in order to gain experience in contracting. He was to build the home at cost.

In May 1993, appellant and Malner decided to build a house for investment purposes on one of the lots, identified as 9250 S.R. 86. Because the home would cost approximately $183,000 to build, Malner obtained a loan in the amount of $70,000, which was secured by a mortgage on her residence. In November 1993, Malner sold her home for $99,000. The mortgage of her home was then paid off. Malner then borrowed $83,500 from the Aljancics to cover construction costs at 9250 S.R. 86, which is where appellant and she lived until the property was sold in January 1996 for $260,000.

In November 1993, appellant and Malner began construction of a third house on the rear portion of the property. That portion of property consisted of 9.89 acres and was identified as 11000 S.R. 86. The house was completed in January 1996. The following sums of money were applied to the construction of the house at 11000 S.R. 86: (1) $142,000 of a total of $201,000 appellant and Malner borrowed from Cherished American Homes, Inc.; (2) $60,000 appellant and Malner borrowed form the Aljancics in a series of transactions in late 1994; (3) $10,000 Malner borrowed from her credit union; (4) $40,000 appellant and Malner borrowed form the Aljancics in February 1996, after construction was completed to defray construction costs; and (5) $50,000 of a $64,000 first mortgage made on the property with Union Federal. Thus, the total construction cost for the house was $302,000.

Appellant and Malner transferred the deed on the remaining 5.801 acres to the Aljancics in December 1995. Consequently, the Aljancics held title to 10.812 acres, while appellant and Malner held 9.89 acres. The remaining 1.688 acres were transferred to the purchaser of the property at 9250 Painesville-Warren Road in November 1995.

Finally, in April 1997, appellant and Malner parted and appellant moved out of the residence at 11000 S.R. 86. At the time of departing, appellant

removed household furnishings, the bulldozer, tractor, backhoe, and dump truck, which have values in the amounts of $8,000, $6,000, and $15,000, respectively. Malner continued to reside at the home and the Aljancics continued to reside at 10500 S.R. 86.

In the trial court's October 8, 1998 judgment entry, it was determined that appellant and Malner share a one-half interest in the property identified as 11000 S.R. 86 and recorded as 11770 S.R. 86. The lower court then partitioned the property pursuant to R.C. 5307.04 and appointed commissioners to impartially view and appraise the property in accordance with R.C. 5307.06, which was eventually sold at a sheriff's sale on January 19, 1999. The trial court dismissed counts two, three, four, and five of appellant's second amended complaint. Those counts were claims for unjust enrichment (counts two and three); breach of contract (count four); and an action to quiet title concerning the tractor, backhoe, and bulldozer (count five). Count six, malicious prosecution; count seven, abuse of process; count eight, slander; and count nine, intentional infliction of emotion duress, were not addressed in the lower court's October 8, 1998 judgment entry.

The lower court also concluded that judgment should be rendered against appellant and in favor of Malner in the amount of $123,238.86. also, judgment was rendered in favor of the Aljancics on their counterclaim against appellant and cross-claim against Malner, jointly and severally, in the sum of $111,238. Finally, judgment was rendered against appellant and in favor of the Aljancics on their counterclaim in the amount of $18,000.

Appellant now timely appeals raising the following assignments of error:

"[1.] [The] trial court erred to appellant's prejudice in applying the law to the facts of this case.

"[2.] [The] trial court failed to consider relevant evidence in apportioning the assets and liabilities of the parties.

"[3.] [The] trial court erred in accepting testimony from Diane Malner as true without assessing her credibility.

"[4.] [The] trial court erred in refusing to admit the testimony of appellant's expert.

"[5.] [The] trial court rendered arbitrary evidentiary rulings which constituted an abuse of discretion.

"[6.] [The] trial court erred in directing a verdict on the claim of malicious prosecution.

"[7.] [The] trial court erred in directing a verdict on the claim of abuse of process.

"[8.] [The] trial court erred in directing a verdict on the claim of intentional infliction of emotional distress.

"[9.] [The] trial court erred in striking appellant's pro se filings and prohibiting appellant from representing himself pro se [*sic*].

"[10.] [The] trial court erred in denying appellant's motion to conform the pleadings to the evidence."

Within his first assignment of error, appellant raises two issues. First, that he was entitled to a greater share of the assets resulting from his business relationship with Malner. Second, that the Aljacics were unjustly enriched at his expense.

With respect to the first issue, appellant characterizes his business relationship with Malner as a joint venture. The trial court determined that this business relationship was a partnership. The rule in Ohio is that partnership law governs joint ventures. *Vargo v. Clark* (1998), 128 Ohio App.3d 589, 595, citing *Al Johnson Constr. Co. v. Kosydar* (1975), 42 Ohio St.2d 29, 32. See, also, *Bennett v. Sinclair Refining Co.* (1944), 144 Ohio St. 139, 151. Since partnership law would apply to either a joint venture or a partnership, this court will simply treat the business entity formed by appellant and Malner as a partnership for the purposes of this opinion.

In his brief, appellant refers to the "years of labor" he invested in his partnership with Malner, and indicates that he believes he should be compensated for that labor in the division of the partnership assets. However, R.C. 1775.17 states in part that "[n]o partner is entitled to remuneration for acting in the partnership business ***." Appellant has provided no evidence of a contract that would entitle him to recover for services rendered, nor has he cited any law that would support that argument. Therefore, the trial court properly determined that appellant is not entitled to any compensation for the labor he contributed to the development of the property owned by the partnership. Furthermore, if appellant were to receive compensation for services provided to the partnership, the value of his services would be offset by the value of the services provided by Malner, a fact which appellant conveniently ignores in his brief.

Appellant also makes note of his "substantial contributions ***both financial and through his labor, to the [partnership]", but fails to specifically identify any such financial contributions. Further, the record indicates that appellant had no assets prior to meeting Malner and that their assets were generally commingled. In view of these facts, it was not unreasonable for the trial court to determine that appellant made no significant, independent financial contributions to the partnership that should have been factored into the trial court's judgment entry, particularly when one considers the convoluted nature of the financial dealings between appellant, Malner and the Aljancics.

Appellant also contends that if we uphold the trial court's decision, the Aljancics will have been unjustly enriched at his expense. The trial court determined that the partnership of appellant and Malner owes the Aljancik's $111,238 for loans made to the partnership. Appellant argues that in reaching that decision, the trial court failed to take into account that value of labor and services appellant provided in

the construction of the Aljancics' house. However, it is important to note that the Aljancics were not part of the partnership. They were at best, investors. And, it is clear that the loans form the Aljancics were negotiated by the parties. The money did not come without "strings" attached.

The elements of unjust enrichment are "'(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment ("unjust enrichment")." *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, citing *Hummel v. Hummel* (1938), 133 Ohio St. 520, 525. In the instant cause, it was understood that appellant would serve as general contractor for the construction of a home for the Aljancics in order to gain experience in the constructions business and that he would receive no monetary compensation. While there was a benefit conferred upon the Aljancics in the form of appellant's labor and services, there was also a benefit conferred upon appellant in that he gained experience as a general contractor. Thus, there was mutual consideration. If the Aljancics had not agreed to take an enormous risk and pay all of the costs arising from the construction of the house, the house never would have been built and appellant would not have had the opportunity to work as a general contractor. Therefore, under the circumstances, it was not unjust for the Aljancics to retain the bargained for benefit of appellant's labor and services without providing him compensation beyond the experience he gained as a general contractor. We note that appellant failed to make this claim until six years after the house had been turned over to the Aljancics. For the foregoing reason, appellant's first assignment of error is not well-taken.

In his second assignment of error, appellant claims that the trial court failed to consider relevant evidence in apportioning the assets and liabilities of

the parties. Under this rubric, appellant rehashes his argument that the Aljancics were unjustly enriched at his expense, which we once again reject. Given the facts and circumstances of this case, including the lack of any sort of written agreement, this court is satisfied with the financial calculations made by the trail court. Appellant's second assignment of error is not well-taken.

In his third assignment of error, appellant states that the trial court erred in accepting the testimony of Malner without first, assessing her credibility. In making this argument, appellant relies on the fact that Malner testified inconsistently as to whether she owned two companies. The mere fact that Malner's testimony was inconsistent does not mean that the trial court failed to assess her credibility as a witness. Rather, the trial court might have determined that, in spite of inconsistencies with respect to that one aspect of her testimony, Malner's testimony as a whole was credible. In general, it is not the responsibility of a reviewing court to weigh the credibility of witnesses and we are "obligated to give due deference to the trial court in these matters." *Castle v. Daniels* (1984), 16 Ohio App.3d 209, 212. Therefore, this court will not reverse a trail court's decision to admit the testimony of a witness based on evidence of a single inconsistency in her testimony. Appellant's third assignment of error is not well-taken.

In the fourth assignment of error, appellant contends that the trial court erred in excluding the testimony of his expert witness, Alan Rattray ("Rattray"). Rattray would have testified to the value of services performed by appellant. Specifically, the value of appellant's excavation work. As we stated previously, the value of appellant's services is not at issue or relevant in this case. Therefore, even if the trial court erred in excluding Rattray's testimony, it would have been harmless error. Appellant's fourth assignment of error is not well-taken.

In the fifth assignment of error, appellant avers that the trial court rendered arbitrary evidentiary ruling, which constituted an abuse of discretion. Specifically, appellant states that the trial court demonstrated favoritism from its rulings. While appellant has a laundry list of complaints with respect to various evidentiary matters, he has presented no evidence that the trial court abused its discretion in rendering those decisions. Appellant's fifth assignment of error is not well-taken.

Appellant's sixth, seventh and eighth assignments of error will not be addressed by this court. With respect to these assignments of error, appellant has failed to comply with App.R. 16(A)(7), which requires appellant to include citations to authorities, statutes and parts of the record on which he relies to advance his arguments as to his assignments of error. Appellant has done nothing more than state the elements of a claim for malicious prosecution and the tort of abuse of process. It also appears that he has failed to provide this court with a copy of the relevant judgment entries and copies of the relevant motions. In addition, he has failed to cite to any specific portion of the trial transcript where the issues raised in these assignments of error were resolved. Instead, he has left it to this court to wade through three volumes of transcripts and attempt to construct a legal argument on his behalf. It is no the duty of this court to search the record for material or locate authority to support an alleged error. Such an expedition would amount to a utilization of this court's resources on an exercise that was appellant's responsibility to complete, and would be manifestly unfair to the opposing parties. See *Doody v. Centerior Energy Corp.* (May 19, 2000), Lake App. No. 98-L-235, unreported, at 4, 2000 WL 655011, citing *Quinn v. Quinn* (Dec. 17, 1999), Geauga App. No. 98-G-2185, unreported, 1999 WL 1313621.

In the ninth assignment of error, appellant states that the lower court erred in striking his *pro se*

filings and prohibiting him from representing himself *pro se*. Appellant asserts that the trial court's decision caused him extreme prejudice. However, in advancing this assignment of error, appellant has failed to articulate how and why such a decision caused him extreme prejudice. This court cannot detect any cognizable harm suffered by appellant as a result of the trial court's ruling.

Additionally, in striking appellant's *pro se* motions, the trial court, in an October 23, 1998 judgment entry, noted that appellant was under a restraining order to prevent his contact with the court or its staff due to his volatile manner and threats of violence he had made against various parties to this case, his own counsel and opposing counsel. This court held *In re: Bowens* (Nov. 9, 1995), Ashtabula App. Nos. 92-A-1711, 92-A-1717, unreported, at 2, 1995 WL 803811, that "a trial court may terminate self-representation where the individual deliberately engages in serious and obstructionist misconduct." In view of appellant's efforts to intimidate the trial court, the trial court was well within its rights to deny him the right to represent himself *pro se*. Thus, appellant's ninth assignment of error is not well-taken.

In the tenth assignment of error, appellant contends that the trial court erred in denying his motion to conform the pleadings to the evidence concerning his attempt to amend the pleading to include a claim for a contract implied in law. "The decision to grant or deny a Civ.R. 15 (B) motion to amend pleadings to conform to the evidence is within the sound discretion of the trial court. Such discretion will not be disturbed in the absence of 'gross abuse' by the trial court." *Northfield Park Assoc. v. Northeast Ohio Harness* (1987), 36 Ohio App.3d 14, 24, citing *Spisak v. McDole* (1984), 15 Ohio St.3d 62, 63. The trial court did not abuse its discretion in denying appellant's motion to amend the pleadings due to its lack of timeliness. Therefore, appellant's tenth assignment of error is not well-taken.

For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

/s
JUDGE JOSEPH DONOFRIO, Ret.,
Seventh Appellate District,
sitting by assignment.

CHRISTLEY, P.J.,
NADER, J.,
concur.

STATE OF OHIO) IN THE COURT OF APPEALS
)SS.
COUNTY OF LAKE) ELEVENTH DISTRICT

MR. JAMES COMINSKY,

Plaintiff-Appellant,

-vs-

DIANE MALNER, et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 98-L-242

For the reasons stated in the Opinion of this court, appellant's assignments of error are not well-taken, and it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

/s/
JUDGE JOSEPH DONOFRIO, Ret.,
Seventh Appellate District,
sitting by assignment.
FOR THE COURT

FILED ON:
SEP 08 2000

STATE OF OHIO)
)ss.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

MR. JAMES COMINSKY,

Plaintiff-Appellant,

-vs-

DIANE MALNER, et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 98-L-242

Appellant's *pro se* "Motion to Amended *(sic)* Brief of Appellant of Facts Contained only in the Recored *(sic)* in thee *(sic)* Above Case" and "Motion to Amended *(sic)* Briff *(sic)* of Appellant of New Facts Regarding Trial Courts *(sic)* Evidentiary Rulings Which Constituted an Abuse of Discretion," both filed with this Court on August 17, 2000, are hereby overruled. Appellant has retained counsel to represent him in this appeal; therefore, all filing should be made through counsel of record.

The Clerk of Courts is instructed to strike these pleadings from the record of this appeal.

The Clerk of Courts is further instructed to serve Appellant with a time-stamped copy of this entry.

/s/
PRESIDING JUDITH A. CHRISTLEY
FOR THE COURT

FILED ON:
OCT 08 1998

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

JAMES COMINSKY Plaintiff	)	CASE NO. 97CV001279
vs	)	JUDGMENT ENTRY
DIANE MALNER Defendant	)	

This action involves plaintiff, James Cominsky's, Second Amended Complaint against defendants, Diane Malner, Andrew and Sylvia Aljancic ("Aljancics") and Union Federal Savings Bank ("Union Federal") for partition of real estate (Count I), unjust enrichment (Counts II and III), breach of contract (Count IV), action to quiet title as to personalty, to wit: a Ford 2600 Farm Tractor, Ford 555 Loaden Backhoe and a Caterpillar D3 Bulldozer; (Count V), malicious prosecution (Count VI), abuse of process (Count VII), slander (Count VIII) and intentional infliction of emotional distress (Count IX), arising from the parties' ownership of a parcel of land as tenants in common for the parties' development of residential real estate and plaintiff and Malner's relationship as cohabitants. Specifically, plaintiff maintains his proportionate share of the real estate in question is 7/8 while the Malner's share is 1/8. Aside from the partition action averred in Count I, plaintiff demands the following: a sum of $550,000.00 against Malner on Count II, $218,278.00 from the Aljancics, and specific performance by the Aljancics to convey three vacant lots to him for purchase price of $4,242.96 an acre on Count IV and a sole interest in the equipment described in Count V.

In her Answer, Malner averred Counterclaims seeking an undivided 4/5 interest in the subject property (Count I) and an interest in personal property, to wit: bedroom set, oak T.V. trays, a rocking chair, a reclining chair, three end tables, gas logs, glass fireplace doors, a couch, another bedroom set and freezer; which she values at $3,500 (Count II), an

interest in the equipment identified in Count V of plaintiff's Second Amended Complaint (Count III) and requesting $55,000 due and owing related to a dump truck which Malner purportedly transferred title to plaintiff.

In their Answer, the Aljancics asserted Counterclaims for money due and owing from loans made to Cominsky and Malner in the amount of $169,438.65, including interest through May of 1997 (Count I) and an action to quiet title as to personalty identified in Count V of plaintiff's Second Amended Complaint. The Aljancics also filed a Crossclaim against their daughter, defendant Diane Malner, for $169,438.65 for the same reasons set forth in Count I of their Counterclaim against Plaintiff.

Upon Malner's motion, this Court's April 24, 1998 Judgment Entry bifurcated plaintiff's claims and ordered separate trials for Count I-V and Counts VI-IX. Counts VI-IX were tried to a jury June 18-20, 1998. Plaintiff dismissed Count VIII on June 18, 1998 and this Court granted Malner's Motion for a Directed Verdict as to Counts VI, VII and IX on June 20, 1998. Counts I-V were tried to the Court on June 8-9, July 31 and August 17-18, 1998. At the conclusion of the Bench Trial and as per this Court's August 20, 1998 Judgment Entry, the parties were ordered to submit briefs in lieu of closing argument by August 28, 1998.

After a description of the salient facts presented at trial, this Court will address plaintiff's action against Malner and the Aljancics, as well as Malner and the Aljancics' Counterclaims and Cross-claims, in turn.

FACTS

The evidence shows that in 1985, Malner was a widow with three minor children. Plaintiff was divorced and had two minor children. After dating for several months, plaintiff and Malner decided to live together in her home. At the time, plaintiff was unemployed and he had no funds with which to pay past or current child support to his former wife.

Plaintiff's unemployment and financial status were described in an affidavit filed with the Lake County Domestic Relations Court. Malner contends she had a house in good repair, no bills, money in the bank, a car, and a job. Notwithstanding the aforementioned affidavit, plaintiff claims he had $20,000, a 1978 Grand Prix, a boat, and some household furniture. The parties continued the living arrangement with plaintiff's two children visiting on weekends and during the summer. Improvements to the home were made to accommodate the plaintiff's children. Malner contends she helped plaintiff with his child support payments during his periods of unemployment, which continued for a number of years. Plaintiff, on the other hand, testified that he invested heavily in Malner's home with both money and labor. Plaintiff further stated that Malner agree to pay him one-half of the excess value between the purchase price and the sale price of her home, in compensation for his labor and investment, totaling approximately $15,000. Malner denies such an agreement was made as the improvements were for the benefit of plaintiff's children. The evidence show, however, the overall value of the realty did benefit from their joint effort.

Throughout their entire relationship, the plaintiff and Malner had no specific agreement, oral or written, as to how to handle their joint assets nor an agreement as to their goals or objectives. They handled their affairs throughout as the moment dictated. After six months of cohabitation, plaintiff gave Malner an engagement ring and asked her to marry him, but the parties were never married. In 1987, Malner decided to purchase a dump truck for $55,000 and created a trucking company in an effort to provide plaintiff with some kind of employment. She borrowed $30,000 from a lending institution and $25,000 from the Aljancics. As reflected in tax returns, plaintiff was hired first as an employee, then as a subcontractor for the trucking company. Plaintiff was not a signatory on the loans as he had filed

bankruptcy previously and was unloanable. This arrangement was continued until 1993 when the truck was paid off and the title transferred to the plaintiff. There was no consideration for the transfer. Plaintiff claims the truck was his by virtue of his labor and defendant claims plaintiff was to transfer his interest in the house to defendant in consideration of receiving the title to the truck.

In 1989, the parties decided to purchase 22.390 acres for $95,000.00 with the Aljancics providing one-half of purchase price and plaintiff and Malner providing the other one-half. Plaintiff and defendant raised $25,000 in cash, some of which came from Malner's CDs and savings accounts she had set aside for the benefit of her children and a joint account with plaintiff. The remaining portion of plaintiff and Malner's $47,500 contribution was in the form of a $22,500 loan from the Aljancics. Thus, the Aljancic's total contribution toward the purchase of the 22.390 acres ($47,500 representing one-half of the purchase price and $22,500 in loans to the Aljancics and Malner) was $70,000. Despite the agreement among the parties to 50-50 ownership and their substantial contribution, the Aljancics were not identified as co-owners in the deed. The land was intended as an investment and for construction of plaintiff and Malner's "dream home." During the summer of 1989, development of the property began to take shape. The land was surveyed into lots and plaintiff selected the rear 9.890 acres on which to build the couple's "dream home." *See* plaintiff's Ex. "A". A driveway was constructed to the rear lot with contractors and plaintiff bearing portions of the work. In order to facilitate the project, the Aljancics agreed to purchase a bulldozer for $20,000 and plaintiff was to pay for the maintenance of the bulldozer. The Aljancics also paid to have a well drilled, the cost to bulldoze a turn-around, one-half the cost of the stone for the drive, the cost of surveying, and some of the repairs to the bulldozer.

In 1991, American Cherished Homes, Inc., and Ohio corporation, was formed in which plaintiff was a 51% shareholder and Malner a 49% shareholder. The purpose of the corporation was to act as general contractor for the construction of various projects which turned out to be the building of three homes. The corporation existed for this purpose from 1991 to 1996 when the parties terminated the corporation.

Although he had worked in the building industry as a laborer, plaintiff had no prior experience as a general contractor. It was agreed he would gain experience in this area by building a home for the Aljancics at cost. In October, 1991, 5.011 acres were deeded to the Aljancics on which to build a house. This house was completed in 1992 and is identified as 10500 S.R. 86.

In May of 1993, plaintiff and Malner decided to build an "investment house" on a one of the lots. This house was assigned the address of 9250 S.R. 86. The projected cost of building this home was approximately $183,000. Malner obtained $70,000 in financing from a lending institution to begin construction of the "investment house" and secured it with a mortgage on her residence. In November of 1993, Malner sold her home for $99,000. The mortgage against her residence was paid off and the balance of the proceeds of $25,733.54 was placed in Cherished American Homes, Inc.'s corporate account. The funds deposited with Cherished American Homes, Inc. and $83,500 borrowed from the Aljancics covered the cost of construction of 9250 S.R. 86. On October 31, 1993, Plaintiff and Malner moved into 9250 S.R. 86 where they lived until the property was sold in January of 1996 for $260,000.

In November of 1993, plaintiff and Malner then began construction of a third home, which was to be their "dream home", on the rear portion of the land. There is no dispute that this "rear lot" consists of 9.890 acres and is identified by plaintiff as 11000 S. R. 86, but is recorded in the Official Records of Lake

County, Vol. 1197 Page 158, as 11770 S.R. 86. Plaintiff and Malner borrowed $201,000 for Cherished American Homes, Inc. to build the home. Malner's Ex. "JJ" and "UUU". Plaintiff and Malner also obtained a $60,000 loan in late 1994 from the Aljancics and Malner later borrowed an additional $10,000 to continue construction of 11000 as there were delays in transferring title and proceed on the sale of 9250 S.R.

In December of 1995, plaintiff and Malner transferred the deed to the Aljancics on the remaining 5.801 acres as the Aljancics were feeling somewhat insecure and indicated no more consideration for loans would be made without securing their 50% interest. Thus, the Aljancics hold title to 10.812 acres and plaintiff and Malner hold 9.890. The plaintiff and Malner transferred 1.68 acres with the sale of the "investment home."

In January of 1996, the "dream home" at 11000 S.R. 86 was completed and plaintiff and Malner moved in. A month later, plaintiff and Malner again borrowed $40,000 from the Aljancics to defray construction costs. *See* Malner's Ex. "UUU". Another loan was made from Union Federal for $64,000, and it is the first mortgage on the property. Cherished American Homes, Inc. received $50,000 of the loan proceeds, while plaintiff without authority, appropriated $9,566.70 into his personal account. The total construction cost of 11000 S.R. 86 was $302,000.

In April of 1997, the parties parted and the plaintiff moved out. Plaintiff also removed household furnishings, the bulldozer, backhoe, tractor, and dump truck from the property and residence. Plaintiff sold the bulldozer for $11,000, he retains the backhoe which has a value of $6,000, the tractor at $8,000, and the dump truck at a value of $15,000. The value of these items was established through plaintiff's testimony. Malner continues to live at the home at 11000 S.R. 86 and the Aljancics continue to reside at 10500 S.R. 86.

LAW AND ANALYSIS

It is well-established in Ohio law that the cohabitation of parties without benefit of marriage will not provide an implied contractual relationship to assert an action for unjust enrichment. In ***Lauper v. Harold*** (1985), 23 Ohio App.3d 168, the Twelfth District Court of Appeals held:

> Cohabitation without benefit of marriage, either statutory or common law, does not create an implied contractual relationship which can be the basis of a claim for damages for amounts expended during the relationship based on a theory of constructive trust or unjust enrichment.

(court's syllabus). *Cf.* ***Dixon v. Smith*** (April 23, 1997), No. 8-96-19, unreported, (Logan Cty.). Subsequently, the Twelfth District utilized its decision in ***Lauper*** to resolve a suit arising form the termination of a lesbian relationship in which the plaintiff sued for unjust enrichment for money spent to improve the defendant's residence:

> The evidentiary material reveal that appellee never promised or indicated that appellant would be reimbursed for improvements to appellee's residence. Appellant assumed that she would be entitle to a division of the improvement's value simply because she viewed the parties' relationship as similar to marriage. However, appellee was not unjustly enriched; appellant lived in appellee's home for approximately nine years and enjoyed the benefits of the improvements the parties jointly made to appellee's residence.

Seward v. Mentrup (1993), 87 Ohio App.3d 601, 604. The Ninth District Court of Appeals expressly followed the ***Seward*** court's holding in deciding an unjust enrichment action in a case involving a couple who formerly cohabited together. ***Tarry v. Stewart*** (1994), 98 Ohio App.3d 533. Thus, cohabitation cannot serve as the foundation of a claim for unjust enrichment

related to money or labor expended on improvements made on a couple's residence.

Ohio law also recognizes that a co-tenant in a tenancy-in-common cannot recover for services or expenses incurred in maintaining or improving the common property without an agreement which provides compensation. In ***Whirrett v. Mott*** (1991), 77 Ohio App.3d 177, the Third District Court of Appeals held that a party was not entitled to compensation for services in maintaining the common property as there was no agreement between the parties regarding compensation. In making its determination the ***Whirrett*** court noted:

> The general rule is that "a tenant in common is not entitled to compensation for services rendered in the care and management of the common property, in the absence of an agreement for compensation."

(quoting 86 ***Corpus Juris Secundum*** (1954) 457, Tenancy in Common, § 68g). The Third District Court of Appeals followed the ***Whirrett*** court's holding, in the context of a partition action, as it also required an agreement for compensation of care and maintenance of common property. ***Bryan v. Looker*** (1994), 94 Ohio App.3d 228. Thus, the existence of an agreement is essential for a co-tenant to receive compensation for money or effort expended in improving a common property.

In light of the foregoing case law, this Court will review plaintiff's claims and Malner and the Aljancics respective Counterclaims and Crossclaims in turn.

Plaintiff's Claims Against Malner and Malner's Counterclaims

Upon review of the evidence presented at trial, a review of the case files and consideration of the motions and briefs submitted, this Court finds plaintiff's action fails as a matter of law as his cohabitation with Malner did not create an implied contract to serve as the foundation of a claim for unjust enrichment and insufficient evidence of an

agreement precludes reimbursement for the labor and money invested in the common property. ***Lauper. Whirrett.*** The difficulty in adjudicating the issues in this case is rooted in the fact that the parties has so intertwined their financial dealings that they now ask this Court to untie a Gordian knot. It is undisputed that the parties resided together, acted and lived as husband and wife for almost 12 years. During this time, they co-mingled funds, assets, property, business relationships, and monetary obligations without any definitive agreement or writing declaring any goals or objections, rights or responsibilities. To the contrary, plaintiff and Malner didn't even have oral agreements as to how to handle their affairs. It is now impossible for the Court to untangle their affairs and assign values to every act and action years after the event. Such a demand is untenable and impossible. The parties voluntarily chose to live together and conduct their relationship as co-owners and co-tenants and each benefited from their relationship daily. The Ohio law provides that it is not the work of this Court, or any court, to assign values to every bit of work performed by the parties over the years.

The main thrust of plaintiff's claims are that he was the prime mover in all the activities and provided much of the physical labor as well as monies to finance the entire operation. Plaintiff claims he either had an agreement for payment of his labor, or there is unjust enrichment through his labor. Plaintiff now wants to revisit and make claims which are inconsistent with the patterns of conduct of the parties. Plaintiff's arguments are fundamentally misplaced as they are inapposite to and stand in stark contrast to established Ohio law. Thus, plaintiff and Malner's respective interests in the real property located at 11000 S.R. 86 must be partitioned in accordance with Chapter 5307 of the Revised Code.

Although the parties agree they were not married and the Court finds there were no agreements, oral or written, the Court concludes plaintiff and

Malner were partners as they commingled business and personal finances and they shared profits and benefits. ***Simandl c. Schimandle*** (1982), 3 Ohio App.3d 357. Plaintiff and Malner's partnership stand separate and apart form their ownership of Cherished American Homes, Inc. as testimony demonstrated that they shared personal assets and business profits to further their objective of "making money" through developing the 22.390 acre parcel. Further, plaintiff and Malner's partnership predated the formation of Cherished American Homes, Inc. and continued after its dissolution. Testimony also showed that Cherished American Homes, Inc. was primarily used as a vehicle for the couple to set up commercial accounts with construction supply vendors and for disbursement of funds, it did not have any other specific purpose. The corporation was dissolved after 11000 was completed. Under the R.C. 1775.07, all property brought into the partnership is partnership property and all assets purchased with partnership funds is partnership property unless there is contrary intention. Under R.C. 1775.17, each partner is to receive his contribution on an equal share of the profits after the obligations are satisfied. The Court finds plaintiff brought no assets into the partnership, and therefore he is relegated to the value of assets generated during the partnership relationship. Further, the above partnership principles are equally applicable to personal property acquired by plaintiff and Malner. They should share the personalty at issue equally, however, plaintiff has removed certain property out of the reach of Malner. Therefore, she should receive one-quarter or one-half of the value of those assets. Malner shall receive $1,750 as credit for one-half the value of the household items taken by plaintiff, $7,500 as one-half the value of the dump truck, $2,000 as one-quarter the value of the tractor, $1,500 and one-half the value of the backhoe, $2,750 as one-quarter the value of the bulldozer.

The Court notes that Malner's Counterclaim demanded $3,500 for household items retained by plaintiff. Malner established value of the household items in her Ex. "LLL" at $14,340. However, this Court may only award the $3,500 as that is the amount prayed for in her Counterclaim.

Plaintiff's Claims Against the Aljancics

With respect to his claims made against the Aljancics, plaintiff contends he is entitled to receive damages in the amount of $69,380.98 for monies expended by him in construction of the private drive along with $49,230.00 for the fair market value of the labor he expended to construct the road. Plaintiff's efforts contributed to his joint venture with the Aljancics as he needed the driveway to gain access to and develop the parcel he chose as the site of his "dream home." The Aljancics likewise invested in the project as they paid half the cost of the drive and improvements, as well as assisting plaintiff with financing and purchasing equipment to accomplish the task. As no specific agreement existed, plaintiff is unable to claim the defendants were unjustly enriched. ***Lauper. Whirrett.*** Further, plaintiff claims he is due $28,360.00 for excavation costs and improvements in the construction of the Aljancic home, as well as $34,500.00 in general contracting fees. Again, no contract existed between the parties which would entitle plaintiff to compensation. *Id.* The parties merely had an informal understanding that plaintiff would forego charging for his general contracting services in exchange for gaining experience as a general contractor. The Aljancics paid all the monies they were called upon to pay during the construction of their house and there were not any other demands for payment until the filing of this suit, some six years later. The Aljancics freely loaned plaintiff and Malner the money and support to accomplish their goals of constructing the "investment house" and helped provided monies to build their "dream home." The Aljancics' assistance was

invaluable over the years as they were an easy source of investment capital merely for the asking. Therefore, plaintiff is not entitled to compensation for unjust enrichment from the Aljancics.

Finally, plaintiff contends he had a contract with the Aljancics to purchase the remaining lots at cost for the construction of additional homes. Mr. Aljancic denies any such arrangement and says he would have considered selling the land to plaintiff if he could make a profit. The parties all agree that the purpose of purchasing the 22 acres was to "make money," and it seems that they did do just that. His intent was never to invest money and then sell the land to the plaintiff at sometime in the future with no return. Plaintiff's contention on this matter runs contrary to reason and common-sense. Plaintiff divested himself of any interest in the property when he signed the deeds to the Aljancics. Plaintiff's arguments attempting to establish an interest in the Aljancic's land are also problematic in light of the Statute of Frauds (R.C. 1335.05). Accordingly this Court finds the plaintiff's claims against the Aljancics are dismissed as he did not established an interest in the land or a right to purchase the land.

The Aljancics' Counterclaims and Cross-claims

Turning to the Aljancics' Counterclaims against plaintiff and Crossclaim against Malner for monies due and owing for unsecured loans, and for the value of a bulldozer, backhoe and tractor. The Court finds there is due and owing the sum of $111,238 from plaintiff and Malner to the Aljancics for monies loaned and not repaid. The Aljancic are not entitled to interest on their loans as there was no meeting of minds among the parties as to the rate of interest or when any interest would accrue. The Court further awards judgment against James Cominsky if favor of Andrew and Sylvia Aljancic in the amount of $11,000 for the bulldozer appropriated by plaintiff, $3,000 for one-half the value of the backhoe and $4,000 for one-half the

value of the tractor, with interest from the date of this order.

Conclusion

This Court finds that Plaintiff James Cominsky and Defendant Diane Malner each share a one-half interest in the property known as 1100 State Route 86 as to Count I of Plaintiff's Second Amended Complaint. In light of this Court's findings, Defendant Malner's Motion for Appointment of Commissioners ought to be granted. Pursuant to R.C. 5307.04, a Writ of Partition ought to be issued regarding the aforementioned property and three (3) commissioners appointed to administer this order to partition in compliance with the provisions of R.C. 5307.06. Count I of Plaintiff's Second Amended Complaint seeking partition of 11000 S.R. 86 remains pending and Counts II, III, IV and V of Plaintiff's Second Amended Complaint are dismissed.

As to Malner's Counterclaims, this Court finds in her favor against Plaintiff on Count I for $1,750 representing one-half the value of the disputed household items. As to Count II of her Counterclaim, this Court finds in Malner's favor against Plaintiff for the following amounts: $99,000 representing the proceeds from the 1995 sale of her original residence and initial contribution to her partnership with Plaintiff, $11,000 representing one-half the value of the dump truck and one-quarter value for each the backhoe and tractor; $4,783.35 related to one-half Union Federal Mortgage loan proceeds appropriated by Plaintiff; $6,705.51 representing one-half of the insurance premiums, real estate taxes and mortgage payments. (this figure takes plaintiff's contribution of $400 to the mortgage into consideration.) Therefore, Malner's judgment against plaintiff totals $123,238.86.

As to the Aljancics' Counterclaim against Plaintiff and Cross-claim against Malner, this Court finds in their favor against Plaintiff and Malner, jointly and severally, in the amount of $111,238 for loans provided to Plaintiff and Malner's partnership. This Court further finds in the Aljancics' favor on their

Counterclaim against Plaintiff in the following amounts: $11,000 representing the total value of the bulldozer; $3,000 representing one-half the value of the backhoe and $4,000 representing one-half the value of the tractor. Therefore, the Aljancics' judgment against plaintiff solely totals $18,000.

WHEREFORE, this Court finds that Plaintiff James Cominsky and Defendant Diane Malner each share a one-half interest in the property identified in the pleadings as 11000 State Route 86 and recorded at Vol. 1197, page 158 of the Official Records of Lake County. This Court, simultaneously with the entry, files a Writ of Partition, pursuant to Section 5307.04 of the Revised Code, as to the aforementioned property. Based upon the above finding, this Court grants Defendant Diane Malner's Motion for Appointment of Commissioners and appoints Michael Suydam, Judy Manning, and Joseph Cannon, as three disinterested free-holders, residents of said County, to impartially view and appraise the lands and tenements in accordance with Section 5307.06 of the Revised Code. Count I of Plaintiff's Second Amended Complaint seeking partition remains pending and Counts II, III, IV and V of Plaintiff's Second Amended Complaint are dismissed.

It is further the order of this Court that judgment be and hereby is entered in favor of Defendant Diane Malner on her Counterclaims against Plaintiff James Cominsky in the amount of $123,238.86.

It is further the order of this Court that judgment is entered in favor of Defendants Andrew Aljancic and Sylvia Aljancic on their Counterclaim against Plaintiff James Cominsky and on their Cross-claim against Defendant Diane Malner, jointly and severally, in the amount of $111,238.

It is further the order of this Court that judgment in favor of Defendants Andrew Aljancic and Sylvia Aljancic on their Counterclaim against Plaintiff James Cominsky in the amount of $18,000.

IT IS SO ORDERED

/s/
PAUL H. MITROVICH, JUDGE

Copies to:
David Gornik, Esq.
David King, Esq.
Cynthia Sasse, Esq.

STATE OF OHIO) **AFFIDAVIT**
) **OF**
COUNTY OF GEAUGA) **DAVID I. MORRIS**

The undersigned, being first fully cautioned and sworn according to law deposes and states that:

1. That I David I. Morris is a licensed private investigators, in the State of Ohio, and been involved in private investigation for over 23 years.
2. That I David I. Morris, conducted personal profiles, derived from public record, for Mr. James Cominsky on the following individual, Mr. David M. King, Attorney at Law, of the Law office of Schraff & King Co., L.P.A. 4230 State Route 306, Suite 310 Willoughby, Ohio 44094
3. That I David I. Morris conducted personal profiles, derived from public records, for Mr. James Cominsky on the following individuals, Mr. Joseph D. King, Attorney at Law, and Julie E. King (Mitrovich) Attorney at Law, and that it is found that Joseph D. King is the husband of Julie E. King (Mitrovich) an the father of the Grandchild, of Judge Paul H. Mitrovich.
4. That it is found that the two mentioned above, Mr. David M. King and Joseph D. King, are in fact, blood relatives, via paternal grandparents
5. And that this information of the relationships between Mr. David M. King and Joseph D. King, was first provided and conveyed, to Mr. James Cominsky in the form of an affidavit, dated on the 6th day of March, 2000

FURTHER, AFFIANT SAYETH NAUGHT.

/s/
David I. Morris

SWORN TO BEFORE ME AND SUBSCRIBED IN MY PRESENCE THIS 21ST DAY OF March, 2001.

/s/_____
NOTARY PUBLIC
Richard L. Janus, Notary Public
State of Ohio
My Commission Expires Nov. 30, 2001

Supreme Court, U.S.
FILED
JAN 2 2002
CLERK

No. 01-703

In The

Supreme Court of the United States

JAMES COMINSKY,

Petitioner,

v.

DIANE MALNER

and

ANDREW and SYLVIA ALJANCIC

Respondents.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

SUPPLEMENTAL BRIEF FOR WRIT OF CERTIORARI

JAMES COMINSKY, *Pro Se*
3718 Ohio Street
Perry, Ohio 44081
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4pp

STATEMENT OF FACTS

Now comes Petitioner who feels compelled to file this Supplemental Brief to the Writ of Certiorari for the following two reasons: 1) not to argue the errors of the trial court or to offend this Honorable Court in any way; but to demonstrate the extreme bias that was created by the trial judge's relationship with the Respondents' legal counsel; 2) being that the Writ of Certiorari was drafted by an attorney hired by Petitioner. Petitioner in return had to file Writ of Certiorari pro se because said attorney hired was not admitted to practice to this Honorable Court at this time, the due date for the filing of the Writ of Certiorari; and even though said attorney had ample time to draft the Writ of Certiorari, Petitioner was never given the opportunity to proofread the Writ of Certiorari; only the time to come in to said attorney office to sign page twenty of the Writ of Certiorari; the rest of the Writ of Certiorari was not made available to the Petitioner at this time to proofread. Petitioner feels that the following things mentioned should have been spelled out in more detail for this Honorable Court; to see the extreme bias that was held against Petitioner by the trial judge.

The trial court demonstrated its extreme bias towards the Petitioner by allowing the Respondents to enter into evidence (41) new exhibits that were never disclosed to the Petitioner, ten minutes before the trial ended on the last day of the trial, completely contrary to the admission of the Petitioner timely filed authenticated exhibits filed three months prior to the start of the trial and the court did in fact deny half of Petitioner's timely filed exhibits.

Petitioner can further demonstrate to this Honorable Court that the trial judge's calculations are off by some $55,000 in the trial judgment entry of Oct. 8, 1998 just by reading this judgment entry and adding the amounts stated of the total cost to build the "investment home" of $183,000 and then add the total cost to build the "dream home" of $302,000 and then add the small series of loans stated by the trial judge; that were borrowed to build these two homes; this is all mentioned on pages 40 and 41, in the Writ of Certiorari; then this Honorable Court will see the error of $55,000 more in costs borrowed to build the two homes. Furthermore, the trial judge denied the only audit done by a certified public accountant in this trial on the Respondents' own record keeping; which was conducted on all the original bank records, canceled checks, and receipts, which shows fraud regarding the Respondents. It was also testified to that one of the Respondents was collecting Survivorship Social Security Benefits and that Respondent would be committing fraud against the Government regarding claims to Petitioner's business and income; which these facts were totally ignored by the trial judge. The trial judge further ignored the testimony of one of the Respondents where Respondent Andrew Aljancic testified that I, the Petitioner, was to make the money on the building of the homes and he was to make the money on the sale of the lots, further demonstrating a partnership. The trial court's judgment entry of October 8, 1998, located on page 39 of the Writ of Certiorari, misstates a fact of a non-existing deed of the true ownership of said property when it was purchased in 1989, "that the Respondents the 'Aljancics' were not identified as co-owners of said property." This in hand

caused the appellate court to also misstate this fact in their judgment entry of January 2, 2001 on page 25 of the Writ of Certiorari. The true deed, when said property was originally purchased in 1989, shows the Aljancics as the co-owners of this property. Also the Petitioner and two of the Respondents – the Aljancics – had agreed to settle our matter in writing before the pretrial conference, but the trial judge would not let us settle our dispute.

The Petitioner requests that this Honorable Supreme Court grant certiorari and allow this case to be reviewed on the merits. Also Petitioner will assure this Honorable Court that Petitioner will be represented by competent legal counsel in this matter if certiorari is granted.

Respectfully submitted,

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